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Before the  
Federal Communications Commission  
Washington, D.C. 20554

FCC 04M-37  
03797

In The Matter of	)	MB Docket No. 04-191
	)	
San Francisco Unified School District	)	
	)	
For Renewal of License for Station	)	Facility ID No. 58830
KALW(FM), San Francisco, California	)	File No. BRED-19970801YA

**MEMORANDUM OPINION AND ORDER**

**Issued:** November 10, 2004                      **Released:** November 12, 2004

1. The question presented for consideration is the appropriate termination date of the relevant renewal period.<sup>1</sup> The parties agree that the relevant period commenced on January 1, 1991, almost fourteen years ago.

**Hearing Issues**

2. Issues set under the *HDO*<sup>2</sup> are the following:
- a. To determine whether San Francisco Unified School District falsely certified its application with respect to the completeness of the KALW(FM) public inspection file and the effect thereof on its qualifications to be a Commission licensee.
  - b. To determine whether San Francisco Unified School District made misrepresentations of fact or was lacking in candor and/or violated Section 73.1015 of the Commission's Rules with regard to its certification in the subject license renewal application that it had

<sup>1</sup> Under consideration are San Francisco Unified School District ("SFUSD") Brief on Termination Date, Enforcement Bureau's ("Bureau") Brief filed October 27, 2004, SFUSD's Reply Brief and Bureau's Reply Brief filed November 2, 2004.

<sup>2</sup> *In The Matter of San Francisco Unified School District For Renewal of License for Station KALW(FM), Hearing Designation Order and Notice of Apparent Liability for Forfeiture* (FCC 04-114), 19 FCC Rcd 13326 (rel. July 16, 2004).

placed in the KALW(FM) public inspection file at the appropriate times the documentation required by Section 73.3527, and the effect thereof on its qualifications to be a Commission licensee.

c. To determine, in light of the evidence adduced pursuant to the specified issues, if the captioned application for renewal of license for station KALW(FM) should be granted.

The *HDO* also provides that:

[I]rrespective of whether the hearing record warrants an Order denying the renewal application for KALW(FM), it shall be determined, pursuant to Section 503(b)(1) of the Communications Act of 1934, whether an ORDER OF FORFEITURE in an amount not to exceed \$300,000 shall be issued against SFUSD for willful and/or repeated violations of Sections 73.1015, 73.3527, and/or 73.3613 of the Commission's Rules, which occurred or continued within the applicable statute of limitations.<sup>3</sup>

3. The following issue was added by the Presiding Judge in *Memorandum Opinion and Order*, FCC 04M-31, released October 8, 2004:

To determine whether station KALW(FM) has provided meritorious service relevant to a renewal of SFUSD's license, and/or relevant to mitigating the amount of any forfeiture.

Such evidence on meritorious service is limited to November 3, 1996, to November 3, 1997 (one year prior to petition to deny), and July 16, 2003 to July 16, 2004 (one year prior to release of the *HDO*). *Id.*

### **Renewal Application**

4. The renewal application of SFUSD was filed with the Commission on August 1, 1997. The Bureau argues that it is unnecessary to establish a firm termination date, arguing that there are "varying" relevant periods for the designated issues. SFUSD seeks definitive dates for considering relevant evidence.

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<sup>3</sup> *HDO* at ¶ 25 (footnotes omitted).

**First Issue  
(1997)**

5. The first fact issue on which evidence will be received is whether SFUSD falsely certified in its renewal application with respect to the completeness of its public inspection file; and whether SFUSD misrepresented or lacked candor in certifying to its local public inspection file's documentation as required by Section 73.3527. All relevant disclosure with respect to the renewal application was completed on or about August 1, 1997.

6. The first issue relates to questions of truth respecting SFUSD's disclosure concerning its public inspection file that was made in its renewal application that was filed on August 1, 1997. The date of filing should provide a definitive "as of" date to serve as a time frame for proving truth or falsity, and intent to deceive or the lack thereof.

**Second Issue  
(2001)**

7. The Bureau also argues that additional relevant evidence relates to SFUSD's disclosure made on April 6, 2001, in response to a staff inquiry dated February 5, 2001. These are separate allegations relating to two distinct events that occurred approximately five years apart. The facts and circumstances were known about responses to staff questions in 2001, but no date(s) of statements containing misrepresentation/lack of candor were set forth in the *HDO*. It is presumed that the Bureau knows of such statement(s), and that it also has knowledge of the relevant date(s).

8. The second issue alleges a lack of truthfulness under § 73.1015, a Commission rule which concerns the duty of licensees to provide truthful written statements and responses to Commission inquiries (false statements). There are no dates alleged in the second issue. In the Bureau's Reply Brief, a relevant date is specified as being April 6, 2001, which is the date of SFUSD's response to a staff letter of inquiry sent on February 5, 2001. The Bureau refers specifically to "SFUSD's April 2001 responses to the staff's February 5, 2001, inquiry letter." But then the Bureau broadly asserts that the second designated issue must also consider "other similar representations made by SFUSD, whenever made." The Bureau argues for a termination date on "the date of the last such representation made by SFUSD regarding the completeness of the station KALW(FM) public inspection file." But the Bureau specifies no specific date or even any "on or about" date, or other time frame with respect to the allegations of the second issue.

### Discussion

9. The Supreme Court has declared:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

*Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950). Here, the burden of proof on all issues has been assigned to SFUSD under the *HDO*. So there should be known dates specified as to when the misrepresentations were alleged to have been made, since SFUSD must be prepared to defend its disclosures.

10. SFUSD has been assigned the burden to prove the truth of written representations which the Bureau knows of (or should know of) and does not identify by date of making. The Court of Appeals has held:

Before the FCC will hold a hearing, the "dispute must be clearly and adequately alleged, it must be factual, and it must rise to the level of a substantial and material issue.

*California Public Broadcasting Forum v. F.C.C.*, 75552 F. 2d 670, 674 (D.C. Cir. 1985). See also *RKO General, Inc. v. F.C.C.*, 670 F. 2d 215, 235 (D.C. Cir. 1981) (though formal notice may not always be necessary "some form of actual notice of the conduct said to be at issue" is required and a party "must not be prejudiced by surprise"). And under modern jurisprudence, there is "greater sensitivity for the notice and hearing requirements of due process." *Id.* Therefore, only where misconduct "is of such a blatant and unacceptable dimension that its existence cannot be denied," may the agency forego formal notice. *Id.* At this point in the case, there does not appear to be shown a "blatant and unacceptable dimension".

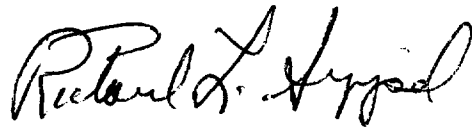
11. Cases in which there are no formal issues set usually involve untruthful testimony before an administrative law judge. See e.g. *William M. Rogers*, 92 F.C.C. 2d 187 (1982), *Old Time Religion*, 95 F.C.C. 2d 713, 719 (Review Bd 1983); *Maria M. Ochoa*, 7 F.C.C. Rcd 6569, 6571 (Review Bd 1992). In this case, the second issue set in the *HDO* is based on pre-designation filings made with the Commission in response to an inquiry letter sent by the Bureau and responded to by SFUSD. SFUSD, the party assigned the burdens of proceeding and proof on the second issue, is entitled to specification of date(s) so that it can receive "actual notice" of the charges, and avoid "being prejudiced by surprise." See *RKO General, Inc. v. F.C.C.*, *supra*.

**Order**

Accordingly, IT IS ORDERED that the relevant renewal time period IS DETERMINED to be from **January 1, 1991, to on or about April 6, 2001.**

IT IS FURTHER ORDERED that by **November 19, 2004**, the Enforcement Bureau shall provide a list of documents and specify dates appearing on the documents and dates of filing with the Commission which the Bureau contends constitute violations of § 73.1015 that are alleged in the *HDO*.<sup>4</sup>

FEDERAL COMMUNICATIONS COMMISSION<sup>5</sup>

A handwritten signature in black ink, appearing to read "Richard L. Sippel", is written over a horizontal line.

Richard L. Sippel  
Chief Administrative Law Judge

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<sup>4</sup> However, these rulings will not preclude the Bureau from introducing any reliable and relevant evidence, regardless of dates, that show any lack of credibility attributable to the licensee and/or a material witness that relate to issues on which SFUSD has the burden of proof.

<sup>5</sup> Courtesy copies of this *Order* were transmitted to counsel for each of the parties by e-mail on the date of issuance.